



Decision

Matter of: Foley Company
File: B-258659
Date: February 8, 1995

William J. DeBauche, Esq., Niewald, Waldeck & Brown, for the protester.
Delia Downer, Department of Agriculture, for the agency.
Katherine I. Riback, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer's rejection of protester's low bid on the basis that the bid contained a mistake was improper where there is no evidence in the record that the bid contained a mistake or was based on a misunderstanding of the work to be performed.

DECISION

Foley Company protests the rejection of its bid and the award of a contract to Barge Company under invitation for bids (IFB) No. KCMO-0026-I-94, issued by the Department of Agriculture for construction services. The agency rejected Foley's bid because it determined that the bid price was so low that it must reflect a mistake.

We sustain the protest.

The solicitation, issued on July 26, 1994, required bidders to submit a lump-sum price for a single bid item, to furnish all labor, materials, and equipment to relocate a water service entry, backflow preventor valve, and water maintenance by-pass valves. The agency issued one amendment on August 12, which made some changes to the technical specifications. The effect of the amendment was to reduce the government's estimate of the cost of the work, which was not disclosed in the IFB, from \$126,000 to \$111,300.

By the August 30 bid opening, the agency had received five bids, ranging from \$41,207 to \$152,550. Foley submitted the low bid at \$41,207. In a letter dated August 31, the contracting officer notified Foley that it was the apparent

low bidder and requested that Foley verify its bid. The contracting officer noted in her letter that Foley's bid was approximately 66 percent less than the government estimate of \$126,000 (citing the estimate that was superseded by the IFB amendment). The letter advised that the bid risked being rejected pursuant to Federal Acquisition Regulation (FAR) § 14.404-2(f) (bid may be rejected where price is unreasonable).

By letter of September 6, Foley confirmed its bid price. Nonetheless, the contracting officer then sent Foley an undated letter stating that its bid was being rejected as nonresponsive and unreasonable as to price, pursuant to FAR § 14.404-2(f), due to the variance between Foley's bid and the other bid prices and the revised government estimate of \$111,300. The agency made award to Barge Company, the third low bidder, in the amount of \$78,000.¹ This protest followed.

The contracting officer acknowledges that, while the letter to Foley stated that its bid was rejected because it was unreasonable as to price, the bid was in fact rejected due to a mistake, in accordance with FAR § 14.406-3(g)(5). The agency contends that Foley's bid was properly rejected under the authority of FAR § 14.406-3(g)(5), which provides that where a bidder:

"fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted, unless (i) the amount of the bid is so far out of line with the amounts of other bids received or with the amount estimated by the agency or determined by the contracting officer to be reasonable, or (ii) there are other indications of error so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders."

Essentially, the contracting officer based her finding of a mistake on Foley's failure to provide a satisfactory explanation of what the contracting officer viewed as an "unconscionably low" bid. In the agency report prepared in response to this protest, the contracting officer states

¹The record provides no explanation concerning why the second low bid of \$48,500 was not considered for award.

²Performance has been withheld pending the outcome of this protest.

that "the cost of materials alone would have exceeded Foley's bid before adding the prevailing Davis-Bacon wage rates." The agency report included the equipment and materials portion of the government estimate, which listed prices for 21 items, such as gravel and backhoe rental. The sum total of these items, according to the agency, was \$46,519.60.

Foley challenges the contracting officer's assumption that its bid contained an error. Foley asserts that it made no mistake and affirms its promise to perform the contract work at the price it bid. Foley points out that it complied with the agency's verification request, and notes that it was never specifically advised that the agency suspected a mistake or asked to provide an explanation or documentation to support its bid price. As evidence of the reasonableness of its price and its willingness to provide the agency with documents to support its bid price, Foley provided its worksheets with its comments on the agency report.

Foley also disagrees with the agency's contention, relied on as the rationale for rejecting Foley's bid, that the cost of equipment and materials alone exceeds Foley's total bid price. Foley points out that the agency more than doubled its estimated equipment and material costs through an arithmetical error. Specifically, Foley points out, and our review confirms, that the correct total for the equipment and materials costs listed in the government estimate was \$21,769.60--rather than \$46,519.60--a figure which is well below Foley's bid price of \$41,207. Foley states that the reduced total for equipment and materials would reduce the overall government estimate to \$86,550.

FAR § 14.406-3(g)(1) requires the contracting officer to advise the bidder if a mistake is suspected. Generally, if the bidder verifies its bid, the contracting officer is to consider the bid as it was originally submitted. FAR § 14.406-3(g)(2). An exception to this general rule arises only where there is clear evidence, notwithstanding the bidder's verification, that a mistake has been made. See Contract Servs. Co., Inc., 56 Comp. Gen. 468 (1987), 87-1 CPD ¶ 521. The concern in that exceptional situation is that the bidder based its bid, and its verification, on

³The agency, in a subsequent submission, states that the equipment and materials portion of the government estimate included with its reports was not "inclusive of all costs," as previously stated. However, the agency failed to provide further information regarding the government estimate and has not specifically denied Foley's allegation of an arithmetical error.

an erroneous understanding of the solicitation requirements and that acceptance of the bid could be unfair. See Panfilis Painting, Inc., B-237968, April 3, 1990, 90-1 CPD ¶ 355. At issue is fairness to the bidder, whose offer was based on a mistaken understanding of the solicitation requirements, since award will result in the government getting "something for nothing" through the bidder's having to perform work different from what it intended, see Handy Tool & Mfg. Co., Inc., 60 Comp. Gen. 189 (1981), 81-1 CPD ¶ 27; and to the other bidders whose offers were premised on a correct understanding of the solicitation requirements, see FAR § 14.406-3(g)(5).

Here, as there was no clear evidence of mistake, the contracting officer's rejection of Foley's low bid was premature. Her August 31 letter requested that Foley verify its bid, which it immediately did by confirming that there was no mistake in the bid, a position that it has consistently reaffirmed since then. Once she received that verification, the contracting officer should not have rejected the bid without first requesting that Foley provide an explanation or supporting documentation to demonstrate to the contracting officer that the bid as verified was correct. Contract Servs. Co., Inc., supra.

Moreover, the documentation submitted to our Office by the agency and the protester during the course of the protest demonstrates that, if the contracting officer had afforded Foley the opportunity to explain its bid, the contracting officer could not have reasonably found a mistake in the bid. Specifically, as explained above, the contracting officer's conclusion was initially premised on a comparison of Foley's bid with a government estimate of \$126,000, which was only later reduced to \$111,300 to reflect the changes implemented in the IFB amendment. Correction of the agency's mathematical error reduces this estimate to approximately \$86,500. The agency does not contend that the contracting officer would have found that Foley's \$41,207 contained a mistake if she had compared it with this corrected government estimate. Indeed, as noted above, another firm also bid less than \$50,000, which tends to support the reasonableness of Foley's bid.

Further, the agency has limited its allegation of mistake to Foley's costs for equipment and materials, which amount to less than one third of the total cost under both Foley's bid and the government estimate. A considerably larger share of the expected cost of performance is attributable to labor, but the agency, despite having had the opportunity through the protest process to review Foley's detailed worksheets, has not challenged any of Foley's labor costs (either the

number of hours of labor estimated for each task or the labor rates to be paid) or alleged any mistake as to those costs. The agency has also not argued that any of Foley's indirect costs reflect a mistake.

As to the equipment and materials costs, the two challenges that the agency raises do not demonstrate a mistake in the bid. First, the agency notes that Foley's worksheets did not include the cost of approximately six items and argues that it would be unconscionable for the government to accept those items at no cost. Foley states that it intends to provide those items from stock it has on hand without charge to the government. While the agency correctly points out that Foley's bid is below cost as to those items, the submission of a below-cost bid is not improper and the government cannot withhold award simply because an otherwise responsive bid is below cost. See BFPE Int'l, B-248783, Sept. 25, 1992, 92-2 CPD ¶ 206.

Second, the agency contends that Foley's bid failed to include certain materials and equipment that were required by the solicitation, and the agency infers from this that the bid was premised on an erroneous understanding about the materials and equipment required by the solicitation. To the extent that Foley may have failed to include any items in its bid that were specifically called for in the IFB, these items were of insignificant dollar value, even under the government estimate. For example, in calculating its bid price, Foley apparently failed to include the cost of two sections of 8-inch cast iron pipe. This item appears to be required by the IFB, and its cost in the government estimate was \$350. While the parties disagree about whether this and several other items are required by the IFB, the value of those items, even under the government estimate, forms so small a proportion of the overall value of the contract that their absence from Foley's bid could not reasonably support a finding that Foley's bid was unconscionably low or otherwise mistaken, as argued by the agency. None of these items suggests a significant mistake or omission in Foley's bid that would indicate that Foley did not understand the scope of the work required by this solicitation.

In sum, we find that the agency rejected Foley's bid prematurely and without a reasonable basis. Accordingly, by separate letter of today to the Acting Secretary of Agriculture, we are recommending that the contract with Barge be terminated for the convenience of the government and award made to Foley, if otherwise eligible. In addition, Foley is entitled to recover the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with

4 C.F.R. § 21.6(f), Foley's certified claim for such costs, including the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

\s/ James F. Hinchman
for Comptroller General
of the United States